

87-1507

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

David Yashon, M.D.,

Petitioner,

v.

William E. Hunt, M.D., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Petitioner David Yashon, M.D., is a licensed doctor of medicine whose speciality is neurosurgery. For a number of years prior to 1981, and in furtherance of his chosen career as a teacher of neurosurgery, Petitioner was employed as a tenured full professor of neurosurgery at The Ohio - State University College of Medicine. Neurosurgery is taught primarily by a doctor having patients in a hospital, and by medical students, interns and residents observing the doctor treating such patients. Therefore, for a number of years prior to 1981, and in conjunction with his position as a professor of neurosurgery at The Ohio State University College of Medicine, Petitioner had medical staff privileges



at The University Hospitals, which is the primary teaching hospital of the College of Medicine.

In 1981, Respondents refused to reappoint Petitioner to the medical staff of The University Hospitals. The parties stipulated and the district court in this action found that Petitioner's expectation of being reappointed to the medical staff was a property interest protected by the due process clause of the fourteenth amendment to the United States Constitution, and that therefore he was entitled to a due process hearing with respect to the issue of his reappointment to the medical staff.

The refusal of Respondents to reappoint Petitioner to the medical staff resulted from a meeting of the

Medical Staff Advisory Committee of The University Hospitals, at which meeting Respondent Larry C. Carey, M.D., Petitioner's division chairman and the chief accuser of Petitioner, was allowed to call thirteen witnesses to support his charges against Petitioner, but Petitioner was not allowed to call any witnesses in his own defense. All or virtually all of the charges utilized in 1981 to deny Petitioner reappointment to the medical staff were utilized in prior disciplinary proceedings against Petitioner, which, if successful, would have resulted in his removal from the medical staff. None of these prior disciplinary proceedings resulted in Petitioner's removal from the medical staff.

The decision of the Medical Staff Advisory Committee not to reappoint Petitioner to the medical staff was not supported by any statement or document setting forth the reasons for such decision or the evidence upon which such decision was based.

Therefore, the case presents to following questions:

(1) Did Petitioner have a right under the due process clause of the fourteenth amendment to the United States Constitution to call witnesses on his own behalf at a hearing to determine if he should be reappointed to the medical staff, or was he limited, as the court of appeals below held, to questioning the witnesses presented against him and to making statements in his own behalf?

(2) Did the due process clause require Respondents to state the reasons for their determination not to reappoint Petitioner to the medical staff and the evidence relied upon in reaching such determination?

(3) Did administrative res judicata prevent Respondents from utilizing in 1981 as grounds for not reappointing Petitioner to the medical staff grounds which had been utilized in the prior disciplinary proceedings?

PARTIES TO THE PROCEEDING

Petitioner: David Yashon, M.D.

Respondents: William E. Hunt, M.D.
Manual Tzagournis, M.D.
Ronald B. Berggren, M.D.
Tennyson Williams, M.D.
Frederick P. Zuspan, M.D.
William H. Saunders, M.D.
Grant Morrow, III, M.D.
Larry C. Carey, M.D.
Earl N. Metz, M.D.
John S. McDonald, M.D.
Calvin M. Kunin, M.D.
William H. Havener, M.D.
Donald A. Senhauser, M.D.
Martin D. Keller, M.D.
Ernest W. Johnson, M.D.
Artis K. Freimanis, M.D.
William R. Wallace
M. Jan Dickson
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Board of Trustees of
The Ohio State University
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PETITION FOR A WRIT OF CERTIORARI
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Petitioner David Yashon, M.D.
("Petitioner"), hereby petitions for a
writ of certiorari to review the
opinion and judgment of the United
States Court of Appeals for the Sixth
Circuit rendered in this case on
August 3, 1987.



OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit which is at issue in this petition was rendered on August 3, 1987, and is reported at 825 F.2d 1016 (that decision is included in the Appendix to this petition, at Appendix pages 1 through 21; due to its length, the Appendix has been submitted as a separate document). That decision affirmed the Opinion And Order entered in this case by the United States District Court for the Southern District of Ohio, Eastern Division, on February 26, 1982; that Opinion And Order is unreported (that Opinion And



Order is included in the Appendix to this petition, at Appendix pages 22 through 96).

This case was reviewed two times by the Sixth Circuit between February 26, 1982 and the review which resulted in the August 3, 1987 decision and judgment of that court. In both of these prior reviews the Sixth Circuit vacated a judgment of the district court and remanded the case to that court for further proceedings. The issues involved in those two prior reviews by the Sixth Circuit are not involved in the present appeal. The two prior decisions of the Sixth Circuit in this case are reported at 696 F.2d 468 (1983) and 737 F.2d 547 (1984).

STATEMENT OF GROUNDS ON WHICH
JURISDICTION OF THIS COURT
IS INVOKED

The decision and judgment of the Sixth Circuit Court of Appeals at issue in this petition was filed on August 3, 1987. An Order overruling Petitioner's petition for rehearing in the Sixth Circuit was filed on September 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

Section 1 of the due process clause of the fourteenth amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or



property, without due process of law;..."

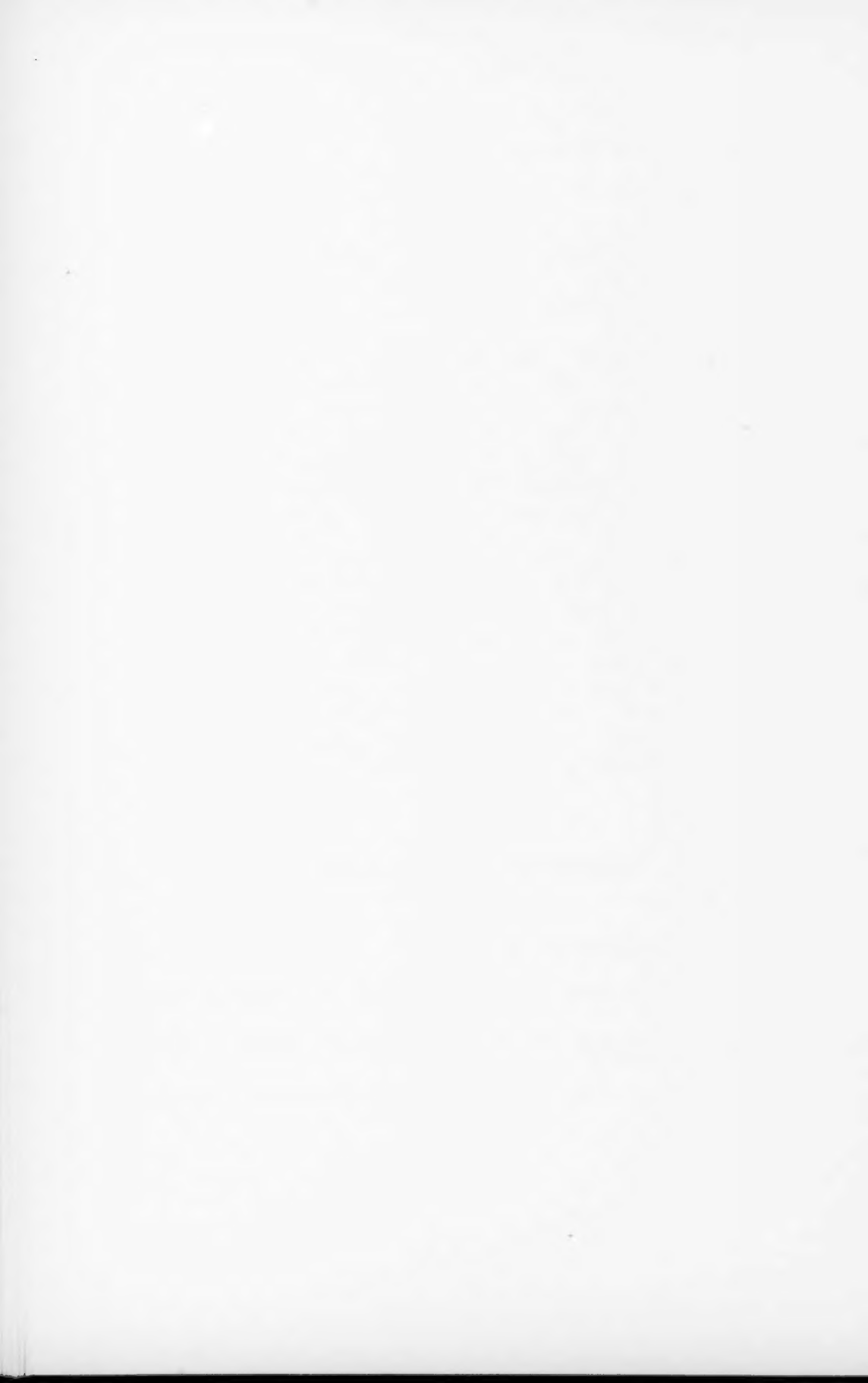
42 U.S.C. §1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Statement Of Facts

Petitioner is a doctor of medicine duly licensed by the State of Ohio. In September of 1969, Petitioner was



appointed to the position of associate professor in the Department of Surgery of The Ohio State University College of Medicine. In 1972, Petitioner was granted tenure by The Ohio State University, and in 1974 he was elevated to the position of full professor of surgery in the Division of Neurological Surgery of the Department of Surgery. Respondent Larry C. Carey, M.D. ("Respondent Carey") is Chairman of the Department of Surgery. Respondent William E. Hunt, M.D. ("Respondent Hunt") is the Chairman of the Division of Neurological Surgery, a division within the Department of Surgery.

Petitioner was appointed to the medical staff of the University Hospitals in September of 1969, at the same time he was first appointed as a



member of the faculty of the College of Medicine. Since 1969, The Ohio State University has annually reappointed Petitioner to his position as part of the faculty of the College of Medicine. From 1969 until July 1, 1981, Petitioner had also routinely been reappointed annually to the medical staff. Prior to June of 1981, Petitioner submitted to Respondent Carey his application for annual reappointment to the medical staff. In June of 1981, Petitioner was informed that Respondent Carey had refused to submit Petitioner's application to the Medical Staff Administration Committee ("the MSAC"), the Committee of The University Hospitals charged with the responsibility for initially ruling on applications for reappointment to the

medical staff, and that therefore Petitioner would be removed from the medical staff effective July 1, 1981.

Respondent Carey's failure in 1981 to recommend Petitioner's application for reappointment to the medical staff was at least the fourth attempt by Respondent Carey to utilize procedures of The Ohio State University to curtail or terminate Petitioner's medical staff privileges. The first attempt was in May, 1978, when Respondent Carey initiated detenurization proceedings against Petitioner based on the allegation that Petitioner had included in a grant application the name of another faculty member of the College of Medicine, without that faculty member's authorization. If Petitioner had been detenurized, he would have

lost his medical staff privileges at The University Hospitals, because only members of the faculty of The Ohio State University College of Medicine are eligible for medical staff privileges at The University Hospitals. Pursuant to Section 3335-5-04(C)(2)(a) of the Ohio Administrative Code, the Dean of the College of Medicine was required to dismiss the detenurization charge "If no reasonable and adequate grounds are found to support the complaint,...." The detenurization complaint against Petitioner was dismissed by the Dean of the College of Medicine in September, 1978.

The second attempt started on October 27, 1979, when Respondent Carey wrote the Dean of the College of

Medicine to institute a proceeding to revoke Petitioner's medical staff privileges. The October 27, 1979 letter listed a number of charges against Petitioner; virtually all of the charges upon which Respondent Carey based his 1981 failure to recommend Petitioner's application for reappointment to the medical staff were the same charges utilized in the 1979 revocation proceeding. Pursuant to the then existing medical staff bylaws, a Grievance Committee of five physicians chosen at random from the medical staff was empaneled to determine the validity of the charges contained in the October 27, 1979 letter. The Grievance Committee requested that Respondents Carey and Hunt and Petitioner submit to it all pertinent written material

concerning these charges; in addition, the Committee interviewed these three individuals and others who had relevant information. After more than thirty hours of investigation and deliberations, the Grievance Committee issued a five-page written report. This report fully and completely exonerated Petitioner, stating, in part:

The Committee feels strongly that this issue has been a disruptive, harmful, and unnecessarily prolonged incident in the history of The Ohio State University Hospitals and within the Department of Surgery. Based upon the overwhelming evidence that exonerates Dr. Yashon, we are puzzled as to why it was not resolved earlier. It is apparent that if Dr. Carey had conducted an objective examination of the facts, he would have found that there was no validity to these charges. Dr. Carey and Dr. Hunt chose not to conduct an objective or impartial evaluation of the facts

which, at best, represents inept administration. There appears to have been a policy of deliberate harrassment of Dr. Yashon. This harrassment has been extremely harmful to Dr. Yashon's potential for an academic career, his image as a physician, and to the Division of Neurologic Surgery, the Department of Surgery, and to The Ohio State University Hospitals.

The unanimous recommendations of the Grievance Committee report included the recommendations that Petitioner's "rights, privileges, and responsibilities as a senior attending physician be fully restored" and that "the strongest possible administrative action be instituted to terminate the policy of harrassment of Dr. Yashon...."

Despite the report of the Grievance Committee and with no further investigation, the Associate Dean of the College of Medicine issued a

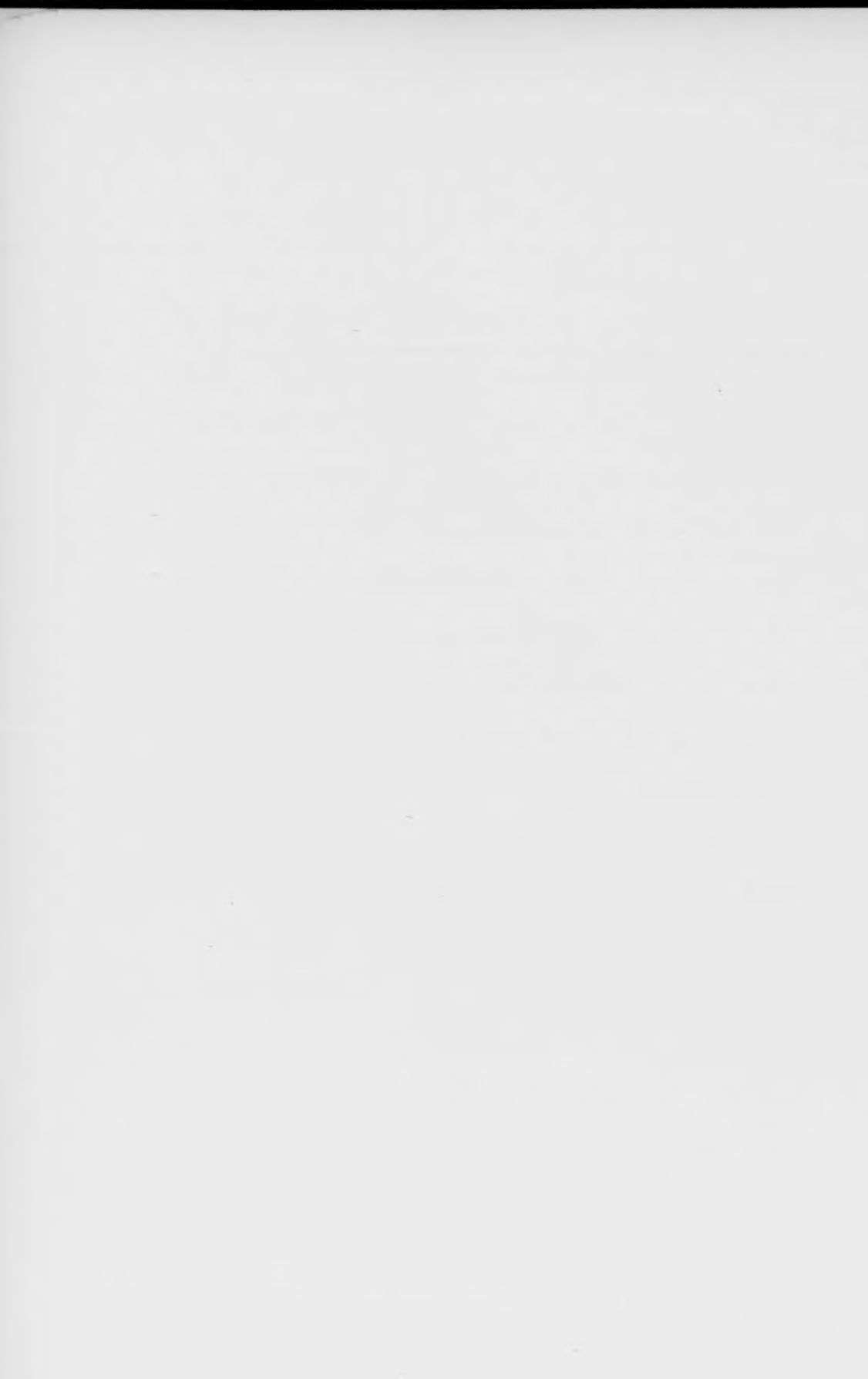


"strong reprimand" to Petitioner. However, the Associate Dean expressly stated that "In view of the conflicting recommendations and opinions available to me, I conclude that they [Respondent Carey's charges against Petitioner] are not sufficient to justify curtailment or reduction of your clinical privileges...." Neither Respondent Carey nor anyone else on behalf of the College of Medicine appealed the Associate Dean's decision not to curtail or reduce Petitioner's medical staff privileges. Although Petitioner did initiate an appeal of the "strong reprimand," he eventually decided to dismiss that appeal.

The third attempt by Respondent Carey to interfere with Petitioner's medical staff privileges was initiated

by Respondent Carey's May 31, 1980, letter to Petitioner, in which Respondent Carey purported to summarily suspend Petitioner's admitting and operating privileges at The University Hospitals; this summary suspension was immediately appealed by Petitioner to the Executive Committee of The University Hospitals, and that Committee promptly concluded that Respondent Carey's action was unwarranted.

Respondent Carey was obviously not deterred by the official rejection of his three attempts to revoke or curtail Petitioner's medical staff privileges. In the spring of 1981, as described above, Respondent Carey refused to recommend Petitioner's annual application for reappointment to the



medical staff for the year commencing July 1, 1981. The present lawsuit was then filed.

On July 17, 1981, -- the day after the lawsuit was filed -- District Judge Joseph P. Kinneary conferred in chambers with counsel for all parties. In that conference, Judge Kinneary stated to counsel that Petitioner's application for reappointment to the medical staff should be forwarded by Respondent Carey to the MSAC for processing in the same manner as other such applications for reappointment were processed. Counsel for Respondents requested that Respondent Carey be allowed to explain to the MSAC his reasons for refusing to recommend the reappointment of Petitioner to the medical staff. Judge Kinneary agreed

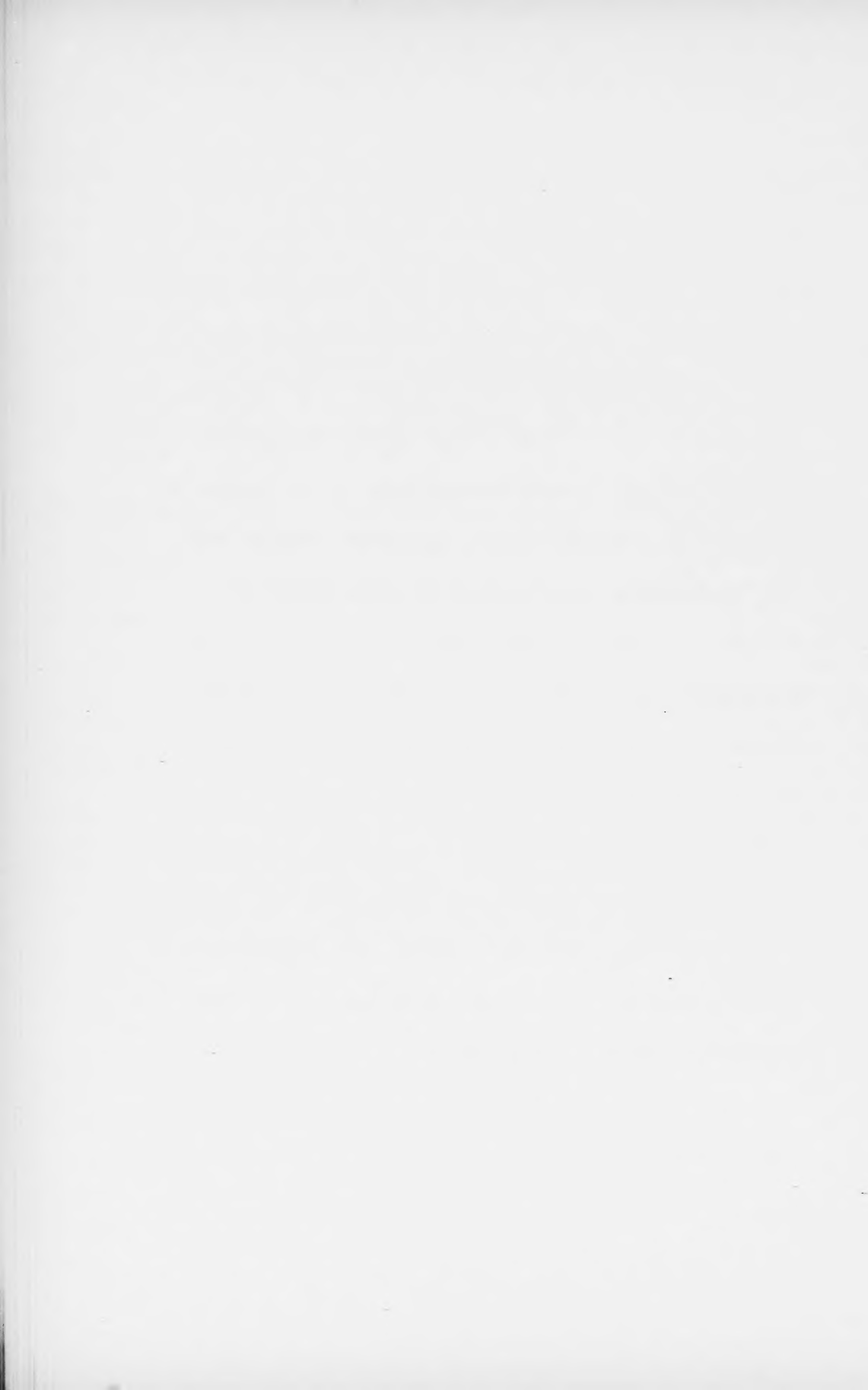
to this request, directing that Respondent Carey personally explain to the MSAC his reasons for refusing to recommend the reappointment of Petitioner to the medical staff, that Petitioner should be present during this explanation and that he be allowed to respond personally to Respondent Carey's explanation. Judge Kinneary indicated to counsel that his directives were prompted by consideration of judicial economy, for if the MSAC acted favorably on Petitioner's application for reappointment, the present lawsuit would be moot. At no time did Judge Kinneary order or suggest that the MSAC conduct a "due process" hearing on Petitioner's application for reappointment to the medical staff.

The MSAC meeting called to consider Petitioner's application for reappointment to the medical staff occurred on September 1, 1981. At that meeting Respondent Carey was permitted to parade thirteen witnesses before the MSAC to give testimony against Petitioner. Virtually all of the testimony from these witnesses concerned incidents which were the subject of the prior disciplinary proceedings and which had already been officially rejected as grounds for removal or curtailment of Petitioner's medical staff privileges. In addition, Respondent Carey presented to the MSAC a compilation of documents which had been prepared specifically for use in one of the prior disciplinary proceedings. Not only was Petitioner



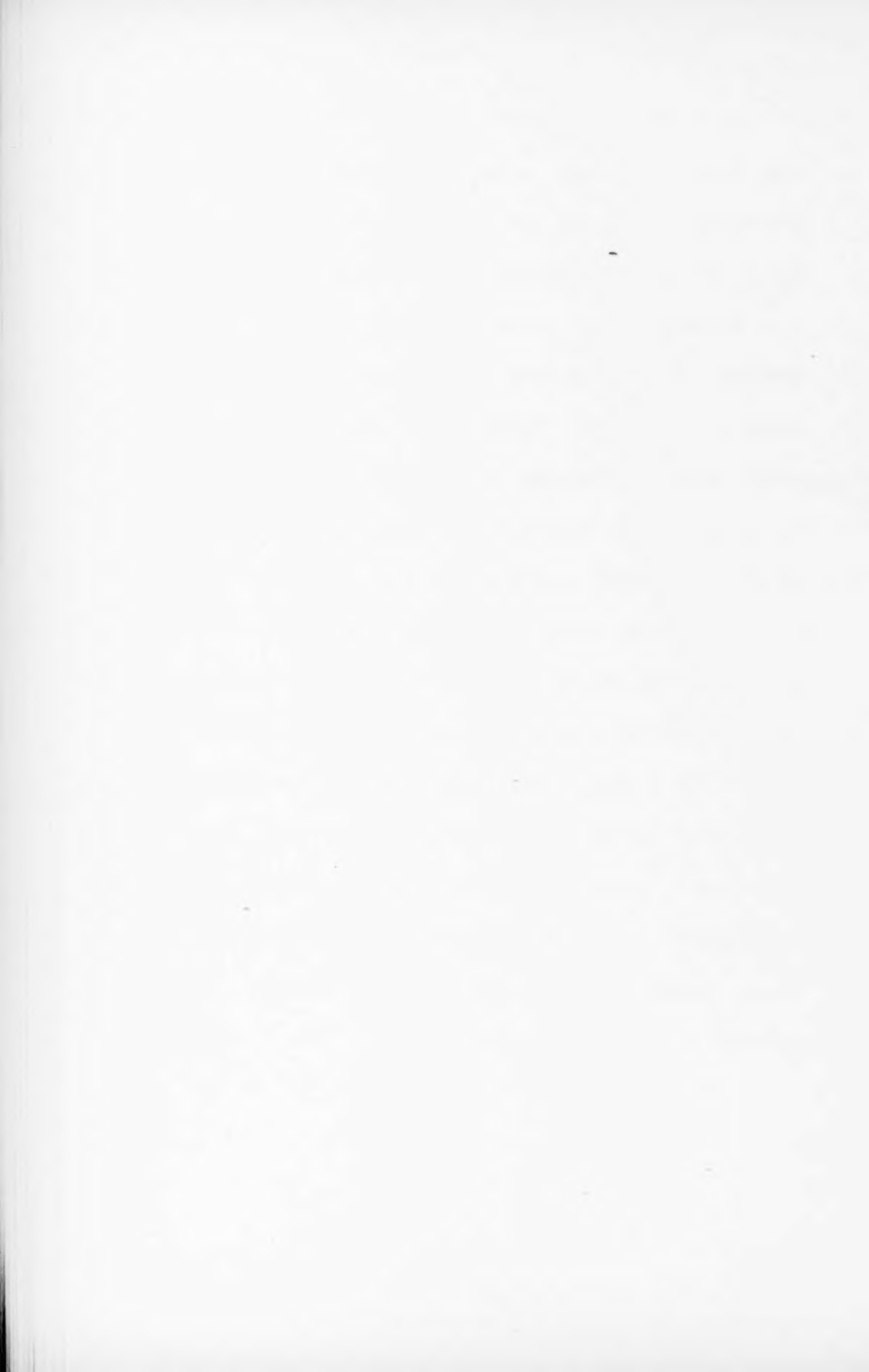
not allowed an opportunity to secure and present witnesses on his own behalf, but also he was not allowed an opportunity to secure and present to the MSAC documents which he had compiled for use in the previous disciplinary proceedings. These documents would have refuted much of the testimony presented to the MSAC.

At the conclusion of its September 1, 1981, meeting, the MSAC voted on Petitioner's application for reappointment to the medical staff. In light of the one-sided nature of the meeting, the result of the voting was assured: the MSAC rejected Petitioner's application for reappointment. The MSAC did not issue any decision, oral or written, stating the reasons for rejecting Petitioner's



application for reappointment to the medical staff or the evidence it relied upon in rejecting that application.

Respondents eventually filed a motion for summary judgment in which they contended that the September 1, 1981 MSAC meeting provided Petitioner with all the procedural due process to which he was entitled. It should be noted that the parties stipulated, and the district court held, that Petitioner's expectation of reappointment to the medical staff was a property interest protected by the due process clause of the fourteenth amendment to the federal Constitution; that holding was never challenged on appeal.



In its February 26, 1981 Opinion And Order, the district court sustained the motion for summary judgment. That Opinion And Order was affirmed on August 3, 1987 by the Sixth Circuit Court of Appeals, and this petition followed.

B. Basis For Federal Jurisdiction

The jurisdiction of the district court was invoked under 28 U.S.C. §§1331 and 1343, 42 U.S.C. §1983, and the fourteenth amendment to the United States Constitution.

REASONS FOR GRANTING OF PETITION

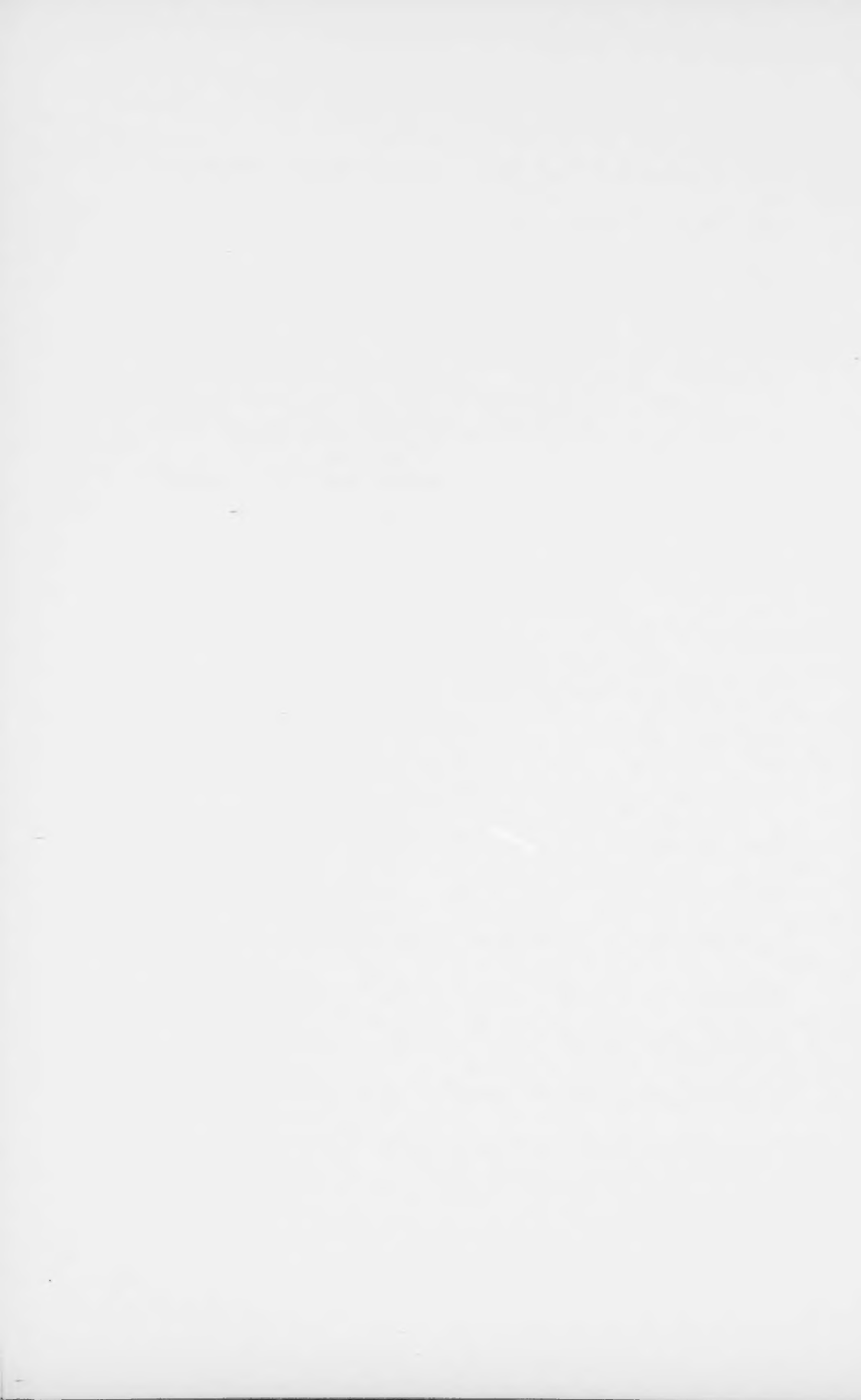
A. The Decision Below Conflicts with Decisions of This Court

The decision of the court of appeals that procedural due process was



not violated in this case even though the MSAC rendered its decision without hearing from any witnesses on behalf of Petitioner and without stating the reasons for its decision and the evidence it relied upon is contrary to a number of prior decisions of this Court. Although none of these prior decisions involved reappointment to a medical staff, the principles announced in such decisions are applicable to the present case.

Prior to discussing the specific due process violations which engendered this petition, the importance to Petitioner of being reappointed to the medical staff of The University Hospitals must be briefly noted. In determining what amount of process is constitutionally required by the due

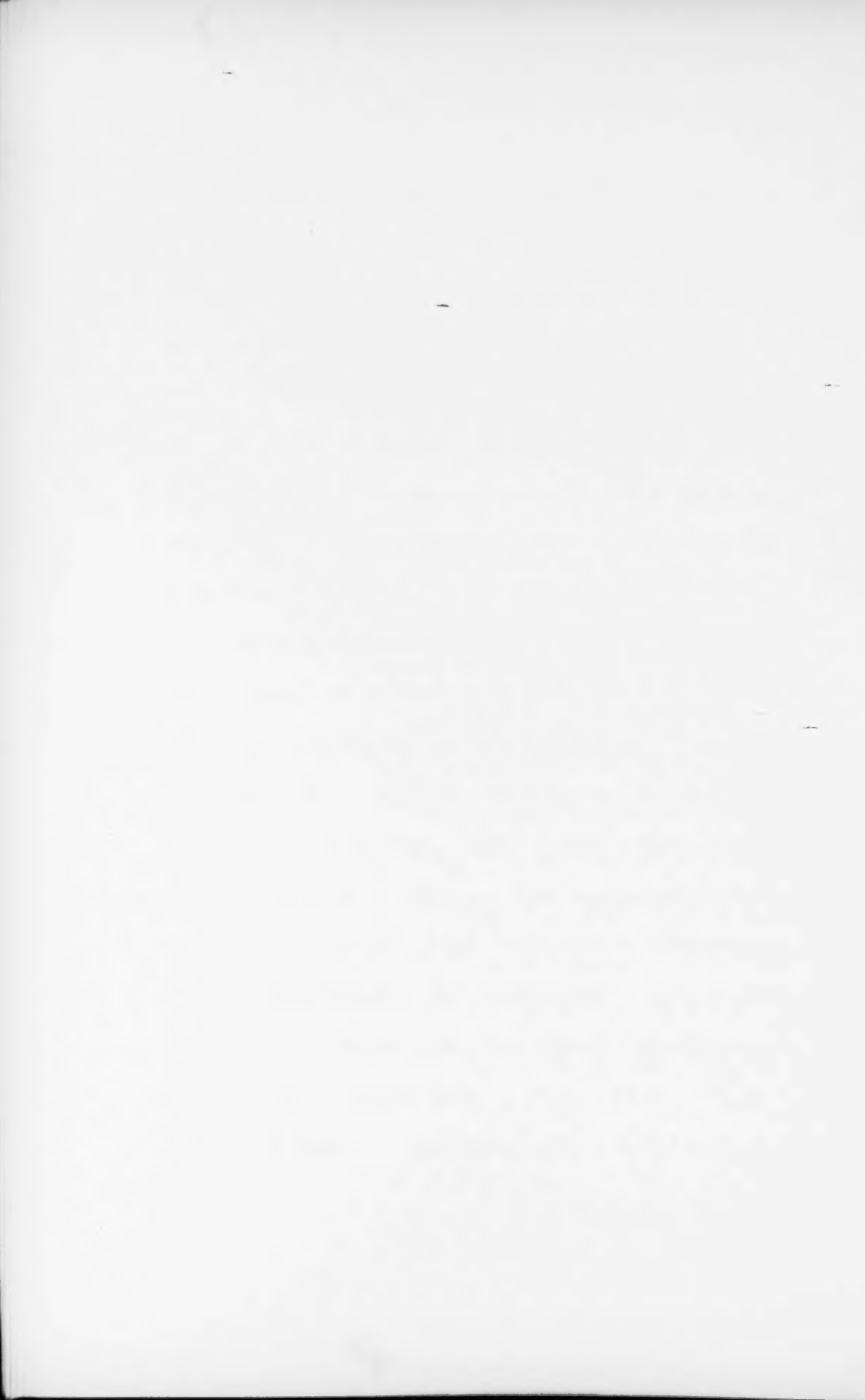


process clause in any specific fact situation, the interest of the individual which is at stake is of critical importance. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The court of appeals grossly understated the importance to Petitioner of being reappointed to the medical staff of The University Hospitals; according to that court, Petitioner's interest in being reappointed was limited to maintaining "his professional reputation and his income." Yashon v. Hunt, 825 F.2d at 1022 (Appendix, page 11). Although these interests are surely substantial, they do not include the paramount interest to Petitioner in being reappointed--that of being able to continue his chosen career as a



professor of neurological surgery in an academic setting.

Virtually all of Petitioner's career has been devoted to practicing medicine in an academic setting. To this day, Petitioner retains his tenure at The Ohio State University College of Medicine, but denial of staff privileges at The University Hospitals has denied him the opportunity to teach. Neurologic surgery is taught by having patients in a hospital; it was undisputed that The University Hospitals was the primary teaching institution for the College of Medicine, and in fact faculty members of The College of Medicine were routinely required to conduct all of their patient practice at The University Hospitals. Hence, by



denying Petitioner reappointment to the medical staff of The University Hospitals, Respondents have in effect attempted to detenurize Petitioner and to terminate his career as an academic professor of neurologic surgery.

1. Prior Decisions Of This Court Hold That When An Individual Is Faced With A Possible Deprivation Of An Important Property Interest Protected By The Due Process Clause Of The Fourteenth Amendment, The Individual Must Be Afforded The Opportunity To Call Witnesses On His Own Behalf

Certainly the most flagrant violation of procedural due process that occurred at the MSAC meeting was Respondents' refusal to allow Petitioner the right to call witnesses on his own behalf. This violation, shocking as it was in and of itself, takes on additional importance in light



of the fact that Respondent Carey was allowed to call thirteen witnesses before the MSAC to testify against Petitioner and in light of the uncontestable finding of the district court that "it is clear that Dr. Yashon did not, prior to the hearing of the Medical Staff Administrative Committee, have any notice that Dr. Carey planned to call witnesses;..." February 26, 1982 Opinion And Order, pages 64-65 (Appendix, pages 85-86).

As stated in Grannis v. Ordean, 234 U.S. 385, 394 (1914): "The fundamental requisite of due process of law is the opportunity to be heard." The court below in effect limited "the opportunity to be heard" to an opportunity simply to cross-examine adverse witnesses and to make



statements in one's own behalf. This limitation is contrary to decisions of this Court.

A "hearing" at which only one side is allowed to call witnesses hardly comports with due process. The right of an individual to present evidence in his own behalf at an administrative hearing is a universally recognized constitutional requirement of procedural due process. E.g., Goss v. Lopez, 419 U.S. 565 (1975); Wolff v. McDonnell, 418 U.S. 539 (1974); Morrissey v. Brewer, 408 U.S. 471 (1972); Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961).

Petitioner recognizes that the constitutional right to be heard in one's defense does not in all cases mandate a formal adjudicatory hearing



in which the parties may call witnesses to testify; in cases involving temporary and minor deprivations of rights, due process may not require that the parties be allowed to call witnesses before the decision-maker. See, e.g., Goss v. Lopez, supra (10-day suspension from school). However, in cases such as the present one, which involve the possible deprivation of an extremely important property interest--the right to continue in one's chosen career--and where disputed factual issues are present, the constitutional right of the individual to call witnesses before the administrative fact-finder has long been established. Wolff v. McDonnell, supra; Morrissey v. Brewer, supra; Goldberg v. Kelly; 397 U.S. 254 (1970).

The court of appeals advanced three reasons for holding that procedural due process was not violated in this case even though the MSAC did not hear from any witnesses on Petitioner's behalf. None of these reasons is valid.

First, the court of appeals stated:

[P]laintiff mischaracterizes the situation when he claims that the defendants refused to allow him the right to call witnesses, since he never requested permission to call his own witnesses. At the outset of the MSAC hearing, plaintiff objected to the presentation of witnesses by Dr. Carey but he did not ask to present his own witnesses nor did he seek a continuance for the purpose of obtaining witnesses. Instead, he agreed to proceed with the hearing and respond to the witnesses called by Dr. Carey. Plaintiff therefore did not claim before the MSAC that he was entitled to call witnesses on his own behalf. Accordingly, there was no outright refusal by the defendants to allow plaintiff to call his own witnesses.

Yashon v. Hunt, 825 F.2d at 1023
(Appendix, page 13).

These statements are clearly incorrect and misleading. At several points during the MSAC meeting, Petitioner complained that "his side of the story" was not being presented. At least one of the members of the MSAC also complained that Petitioner should be given the opportunity to put on his case, as opposed to just cross-examining Respondent Carey's witnesses and making statements in his own behalf. All these complaints were ignored. It is therefore clear that Petitioner did request the right to call witnesses on his own behalf.

The statement by the court of appeals that Petitioner should have sought a continuance for purposes of



obtaining his own witnesses is also unfounded. It is clear from the transcript of the MSAC meeting that the MSAC was only going to listen to Respondent Carey's evidence. For example, at the conclusion of testimony by Respondent Carey's witnesses, one of the members of the MSAC suggested that the hearing be concluded; this suggestion touched off the following remarkable colloquy:

Dr. Whitcomb [Chairman of the MSAC]: Unless there are questions for Dr. Hunt, I think it should be concluded. I think both Dr. Carey and Dr. Yashon should have the opportunity to make some concluding remarks. Those remarks should be brief because the time has been long.

Dr. Berggren [a member of the MSAC]: Mike, is it your intention to have any rebuttal witnesses, for us to hear the grievance committee or any similar things, or is this

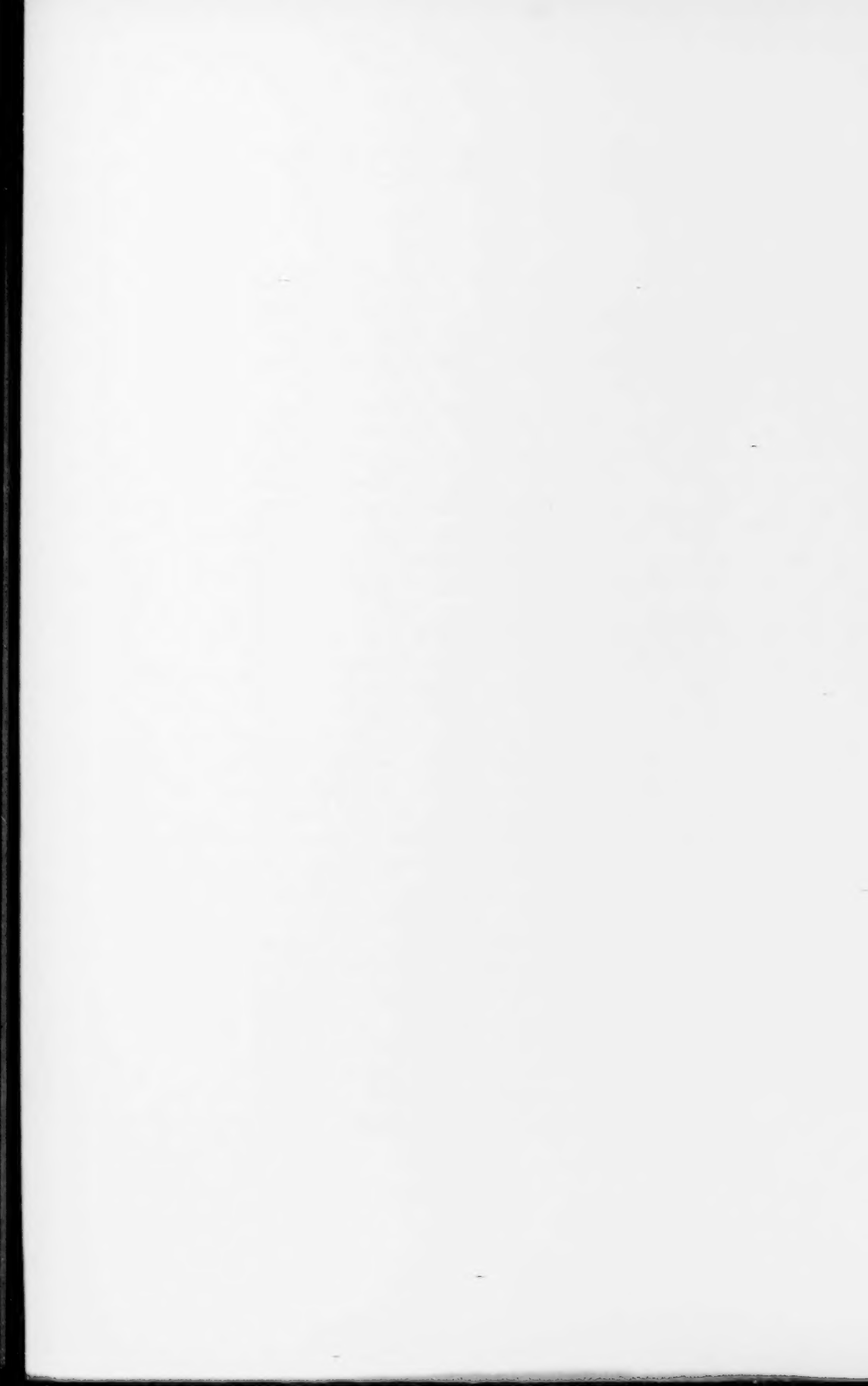


presentation the final one which we must address?...

. . .

Dr. Berggren: ...It would seem appropriate to hear from the grievance committee and to give David an opportunity for rebuttal. Seemingly, there were some witnesses who convinced the grievance committee that he had done some good things. We have heard a lot of witnesses that said he has done a lot of bad things. I have been listening to these things for about five years, and I am still confused. I don't know whether that's your intention, but I would suggest that it should be.

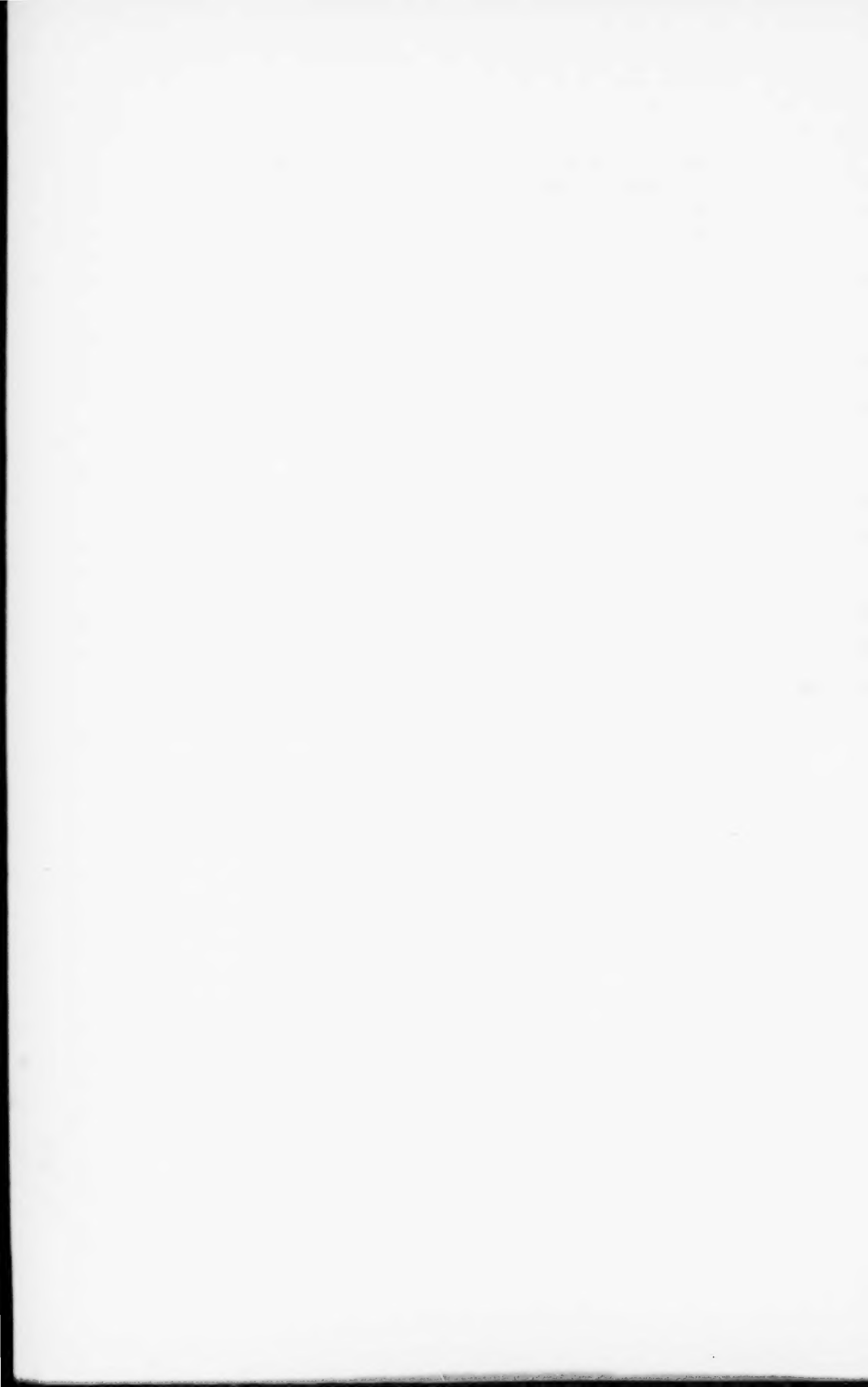
Dr. Whitcomb: Well, my intention was that we adhere to the directions that were given in chambers and conveyed to us by counsel, Ron, which was that the purpose of this hearing was to hear Dr. Carey's presentation of his reasons for not recommending Dr. Yashon for reappointment to the medical staff. It was not specifically to completely go over ever [sic] fact that could be raised on both sides, but for Larry to present his



reaons and for David to have an opportunity to respond to those and for this group to hear them. That was the intention of the meeting.

Dr. Berggren: But your point that Dave has an opportunity to respond I think would imply that he should have an opportunity to review the evidence and respond to it, rather than have to do it sort of off the cuff. Now, you might say that he has been working on it also for about-- what is it, six years?-- and should have it all at his fingertips, but there is quite a difference. I think Larry's presentation today was very well organized, very well presented and states the case well, but I believe it is Larry's case. If that's the only case we are listening to to make this decision, so be it, but it seems to me to be somewhat unfair, perhaps, and my major concern, really, is that the hearing be a fair meeting.

A discussion then followed concerning the development of the format for the September 1, 1981 MSAC



meeting. The discussion concerning the purpose of the meeting was then renewed:

Dr. Whitcomb: We were in no way attempting to do anything that would be unfair, and we specifically were not to create a situation in which, on the one hand, we present a great deal of information here and a great deal of information there. We were simply to hear why did Dr. Carey make his recommendation? That was all. The purpose of the meeting is what was Dr. Carey's reasoning?

Dr. Berggren: Is this your understanding, Dave?

Dr. Yashon: No.

Given the Chairman's view of the purpose of the MSAC meeting, obviously a request by Petitioner either for the opportunity to call witnesses on his own behalf or for a continuance to secure such witnesses would have been futile.

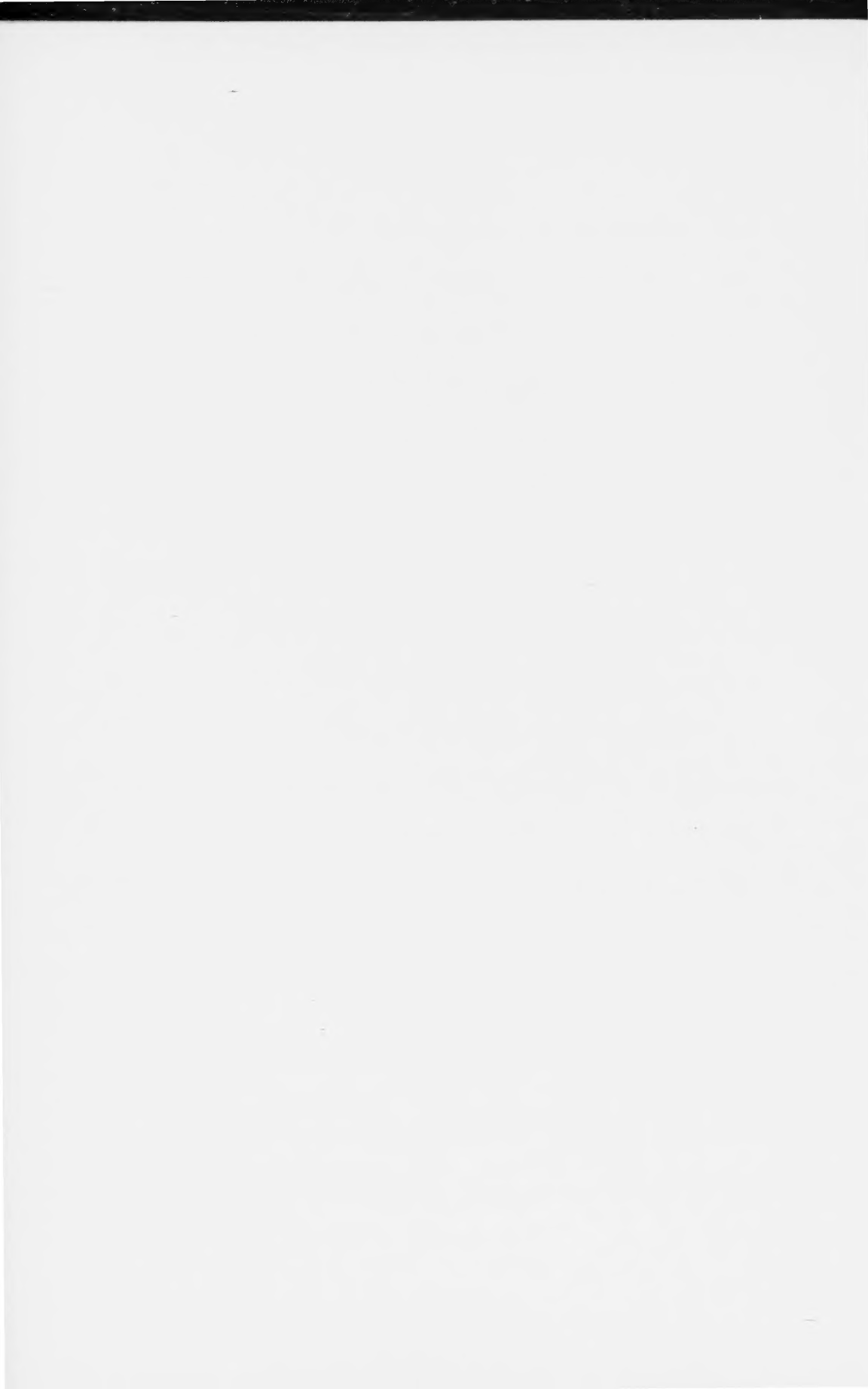


Petitioner had a constitutional right to call witnesses in his own behalf. Although the court of appeals expressly refused to recognize such a right, it also implied that by not expressly asking for the opportunity to call such witnesses and by not seeking a continuance of the meeting to secure the presence of such witnesses, Petitioner waived any right to call witnesses on his own behalf. This implication is unfounded both legally and factually. This Court has held that a waiver of constitutional rights requires a showing of "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Additionally, courts must indulge every reasonable presumption against a waiver

of fundamental constitutional rights. Id. In the present case, Petitioner was never afforded an opportunity by the MSAC to call witnesses on his own behalf; in fact, as demonstrated above the MSAC believed it was only to hear from Respondent Carey's witnesses. Here, Petitioner clearly did not waive his right to call witnesses on his own behalf.

The second reason advanced by the court of appeals for holding that no procedural due process violation occurred when the MSAC rendered its decision without allowing Petitioner to call witnesses in his own behalf was:

[P]laintiff has never shown what additional evidence or testimony he could have presented at the hearing had he been given the opportunity to do so. The district court

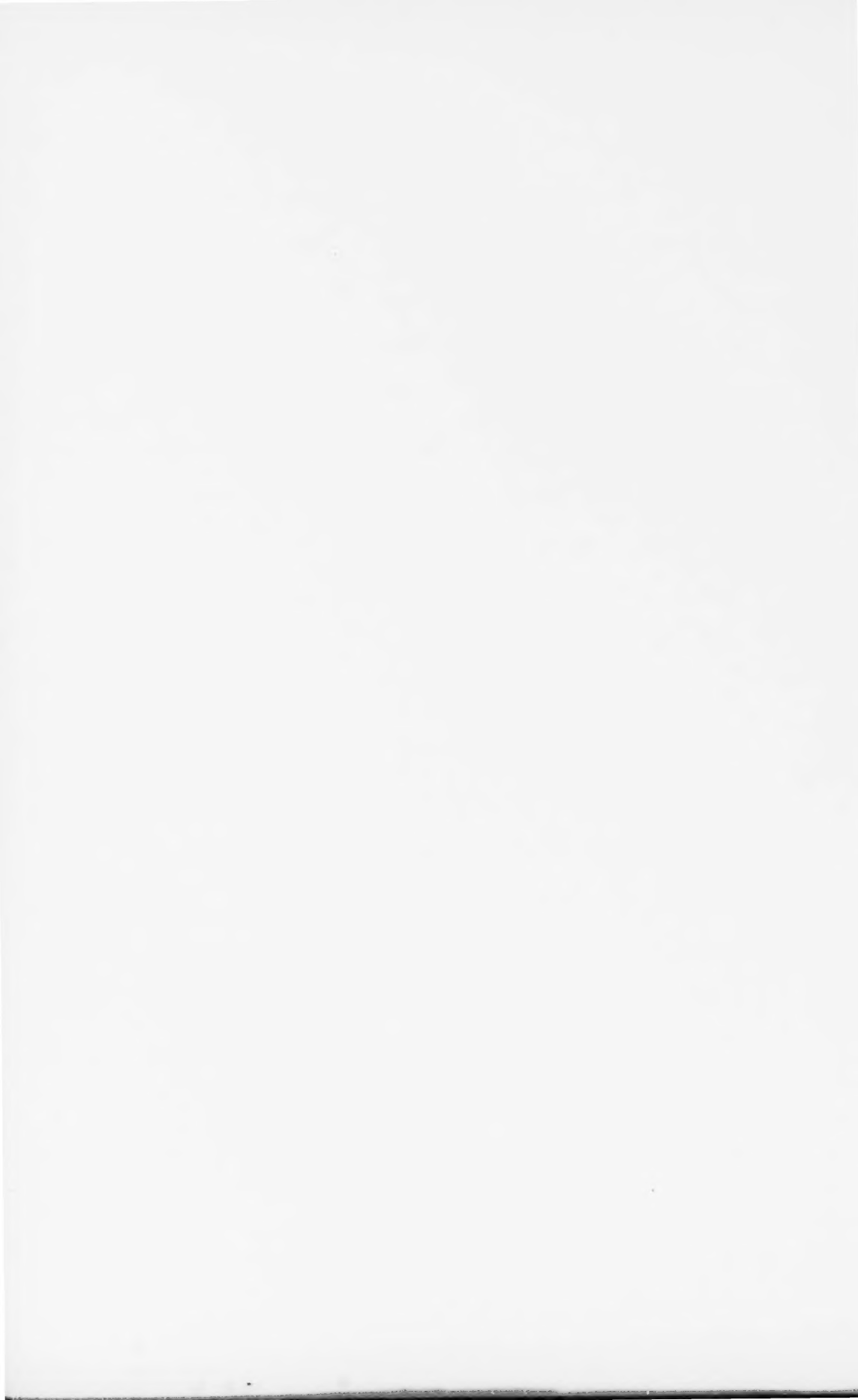


below observed that plaintiff had not, either at the hearing or in his filings with the district court, "proffered the name of any witness he would have called." In the absence of any such proffer, we have no basis for concluding that plaintiff was prejudiced by not having any witnesses testify on his behalf.

Yashon v. Hunt, 825 F.2d at 1023
(Appendix, page 14).

This statement is rebutted by the record in this case. Petitioner did indicate at the MSAC meeting that he had witnesses who would rebut Respondent Carey's charges. Additionally, District Judge Kinneary expressly found that a number of the charges pressed against Petitioner by Respondent Carey "are of such a nature as to permit an inference that there are other witnesses whom Dr. Yashon

might have called in support of his contention that the charges are groundless or that the charges are of slight importance"--February 26, 1982 Opinion And Order, page 34, (Appendix, page 55) -- and "were such that, had Dr. Yashon been given the opportunity, he may have been able to present rebuttal testimony"--February 26, 1982 Opinion and Order, page 55, (Appendix, page 76). Finally, at the MSAC meeting, Dr. Berggren, a member of the MSAC, told the Committee: "Seemingly, there were some witnesses who convinced the grievance committee that he [Dr. Yashon] had done some good things." At a minimum, Petitioner could have called the five members of the Grievance Committee, whose report completely exonerated Petitioner. In summary, the



record is replete with indications that Petitioner had witnesses who could have testified in his behalf and hence it is incorrect for the court below to assume that Petitioner was not prejudiced by the failure of Respondents to allow him to call witnesses on his own behalf.

The third reason stated by the court of appeals for rejecting Petitioner's claim that he had a right to call witnesses in his own behalf was that:

[W]e are satisfied that the essential requirement of procedural due process was satisfied here; that is, plaintiff was afforded a meaningful opportunity to be heard. Throughout the hearing, plaintiff had the means to rebut the evidence presented against him, as he was permitted to thoroughly cross-examine the witnesses called by Dr. Carey and to make statements on his own behalf in response to the witnesses' testimony.



Yashon v. Hunt, 825 F.2d at 1023-24
(Appendix, pages 14-15).

This reason has already been rebutted above. The right of Petitioner to be heard was not limited to the right to cross-examine adverse witnesses called by the State and to make statements in his own behalf; that right included the right to call witnesses on his own behalf.

2. Prior Decisions Of This Court Hold That Both Procedural And Substantive Due Process Require That The State, In Terminating A Property Interest Protected By The Due Process Clause Of The Fourteenth Amendment, Specify Both The Reasons For Its Decision And The Evidence It Relied Upon

Once a state-operated hospital grants a physician medical staff privileges, the hospital can terminate

or refuse to renew those privileges "only for those matters which are reasonably related to the operation of the hospital." Sosa v. Board of Manager of Val Verde Memorial Hospital, 437 F.2d 173, 177 (5th Cir. 1971). The hospital's decision to terminate or not to renew the physician's medical staff privileges must "be untainted by irrelevant considerations and supported by sufficient evidence to free it from arbitrariness, capriciousness or unreasonableness." Woodbury v. McKinnon, 447 F.2d 839, 842 (5th Cir. 1971). In other words, a physician whose medical staff privileges are being terminated, either by revocation of those privileges or by failure to reappoint him to the medical staff, is

entitled to substantive as well as procedural due process.

To allow a reviewing agency or a reviewing court to determine if substantive due process has been complied with by an administrative agency which has deprived a person of a property interest protected by the due process clause of the fourteenth amendment, the United States Supreme Court has held that due process requires the agency to recite, either orally or in writing, both the reasons for its actions and the evidence which it relied upon. Wolff v. McDonnell, supra at 564; Morrissey v. Brewer, supra at 489.

In the present case the MSAC did not state either the reasons for its decision to reject Petitioner's application for reappointment to the

medical staff or the evidence it relied upon in making that decision. It was therefore impossible for the courts in this case to review the MSAC's action to determine if that action complied with substantive due process.

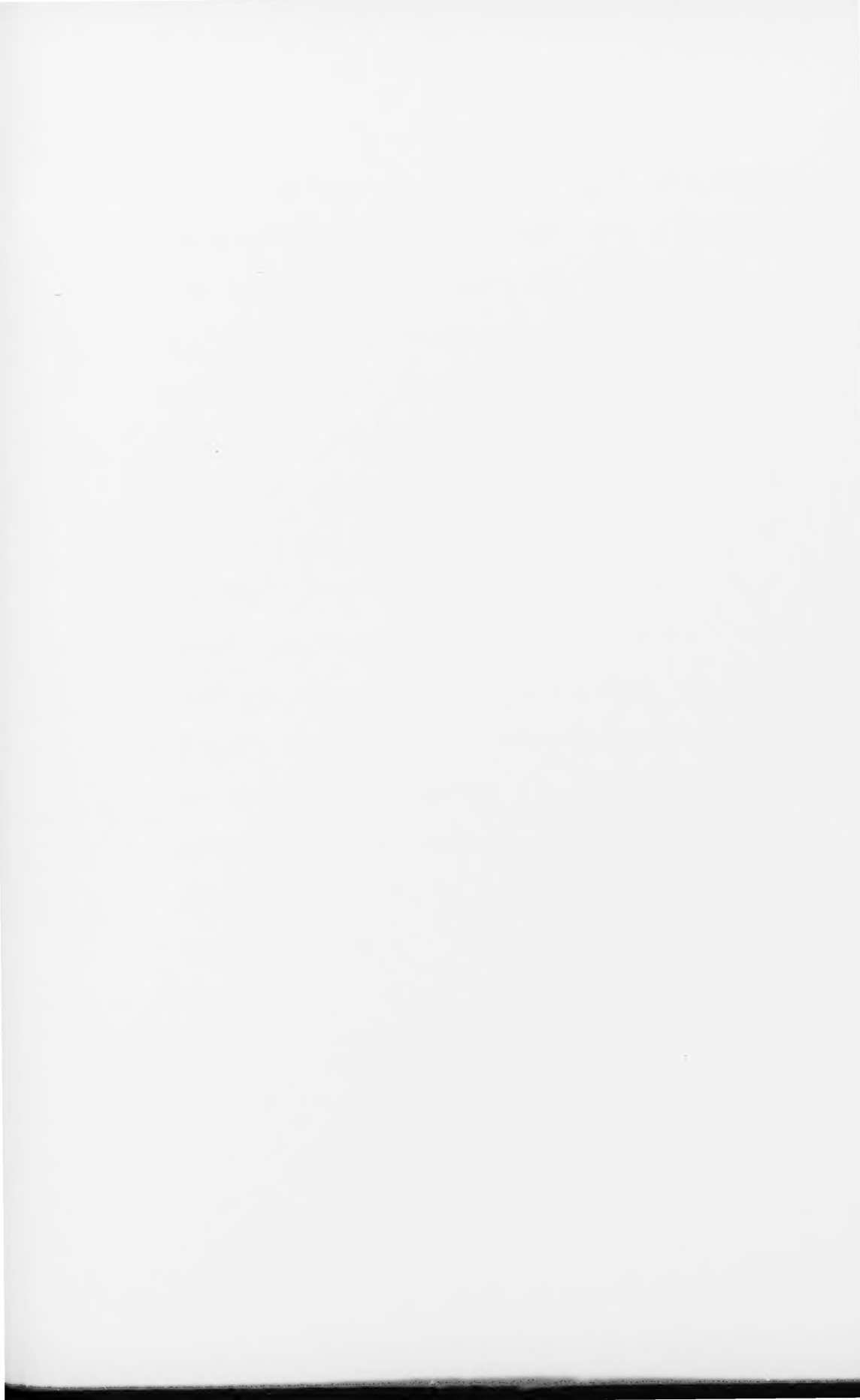
The requirement of a statement from the MSAC as to the reasons for its decision and the evidence it relied upon is especially important in this case for two reasons. First, as District Judge Kinneary found, "there was no testimonial evidence as to" six of the twenty-two charges leveled against Petitioner by Respondent Carey at the MSAC meeting. February 26, 1982 Opinion And Order, page 32. (Appendix, page 53). Without the benefit of a statement from the MSAC as to the reasons for its decision and the

evidence it relied upon, it is impossible to determine if its decision was based in whole or in part on charges for which there was no evidence. Second, as Judge Kinneary also found, none of the charges preferred by Respondent Carey against Petitioner alleged "conduct violative of presently promulgated bylaws of The University Hospitals Board or of any other administrative rules governing the conduct of the members of the medical staff,... ." February 26, 1982 Opinion And Order, page 58 (Appendix, page 79.) The absence of any such violation of bylaws or rules, coupled with the lack of any indication from the MSAC as to why it decided to reject Petitioner's application for reappointment to the medical staff,



rendered impossible a determination of whether the MSAC based its decision upon reasons rationally related to the operation of The University Hospital.

In rejecting Petitioner's claim that the lack of a statement from the MSAC setting forth the reasons for its decision and the evidence it relied upon violated his due process rights, the court of appeals reasoned that because there was a transcript of the MSAC meeting, both the district court and the court of appeals were able to review that transcript and determine that "the MSAC relied on appropriate considerations in rendering its decision." Yashon v. Hunt, 825 F.2d at 1024 (Appendix, page 16). That reasoning is obviously purely speculative; without a statement from



the MSAC stating why it rejected Petitioner's application for reappointment to the medical staff and the evidence it relied on for such rejection, no court can possibly determine that "the MSAC relied on appropriate consideration in rendering its decision." All a court can do in such a situation is speculate that the MSAC may have acted properly. However, pursuant to this Court's decisions in Wolff and Morrissey, Petitioner is constitutionally entitled to a written decision from the MSAC to test whether in fact it did act on proper grounds.

There is another important reason for rejecting the reasoning of the court of appeals that its and the district court's independent review of the transcript of the MSAC meeting



cured any error raised by the failure of the MSAC to state the reasons for the action it took and the evidence it relied upon. The decision to expel a physician from the medical staff of a hospital is clearly the responsibility not of a court but of the proper administrative body within the hospital. Klinge v. Lutheran Charities Association, 523 F.2d 56 (8th Cir. 1975). A federal court's review of such action is limited to determining whether the procedure used complied with due process requirements and whether the administrative body was presented with substantial evidence to support its actions. Woodbury v. McKinnon, supra. Although the MSAC in the present case ruled, after a meeting biased against Petitioner, that the Petitioner should not be reappointed to



the medical staff, it did not state the reasons for such determination or the evidence it relied upon. Hence it is entirely possible that the MSAC based its decision upon arbitrary or unfounded charges, in violation of Petitioner's due process rights. By adopting a rule that the lack of a statement from the appropriate hospital committee as to why it refused to reappoint a physician to the medical staff and the evidence it relied upon is cured by the existence of a transcript of the meeting at which the decision was made and a review of that transcript by a court to determine if there were some adequate grounds for the action taken, the court of appeals in effect transforms the courts of this country into "super medical staff credentials committees", with the power



to determine whether a physician should remain on the medical staff. Such determinations must, however, be made by the appropriate committee of the hospital involved, and not by a court.

B. The Decision Below Conflicts With Decisions Of Other Courts of Appeals

In rejecting Petitioner's claim that he had a constitutional due process right to call witnesses in his own behalf, the decision of the court of appeals below conflicted with decisions of other federal courts of appeals. In a number of cases involving the termination of a doctor's medical staff privileges, federal appellate courts have directly held or implied that the procedural due process protections that must be afforded to the doctor include the right to call witnesses on his own behalf. Lew v.

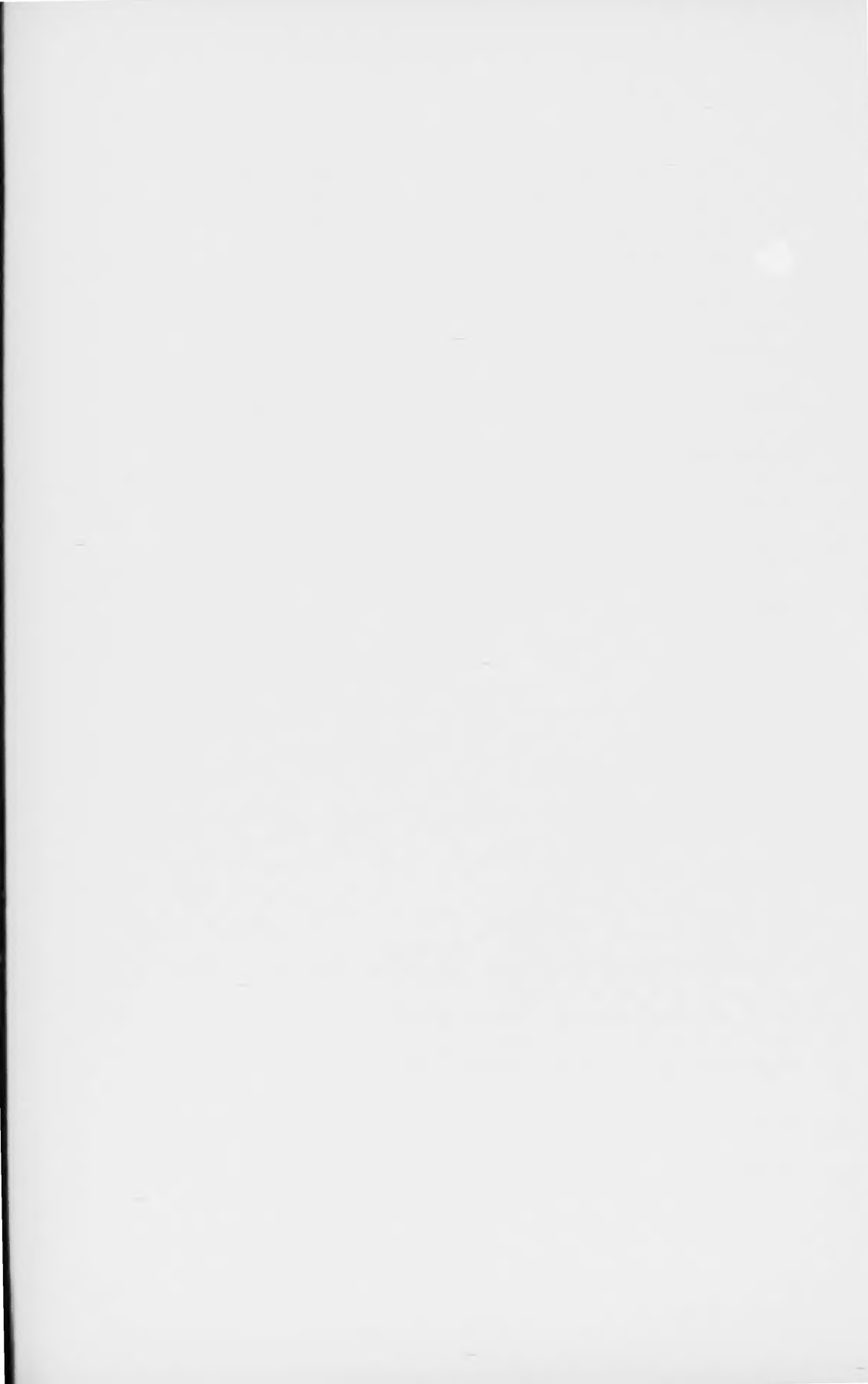


Kona Hospital, 754 F.2d 1420, 1424-25 (9th Cir. 1985); Duffield v. Charleston Area Medical Center, 503 F.2d 512, 515 (4th Cir. 1974) ("In the case of a withdrawal or denial of hospital privileges, procedural due process entitles a physician to a full, evidentiary administrative hearing"); Christhilf v. Annapolis Emergency Hospital Association, Inc., 496 F.2d 174, 178-79 (4th Cir. 1974) (before terminating a doctor's medical staff privileges, procedural due process requires among other things that the physician be afforded "the right to present evidence in his behalf" in addition to "the right to rebut evidence against him, and the right of cross examination."



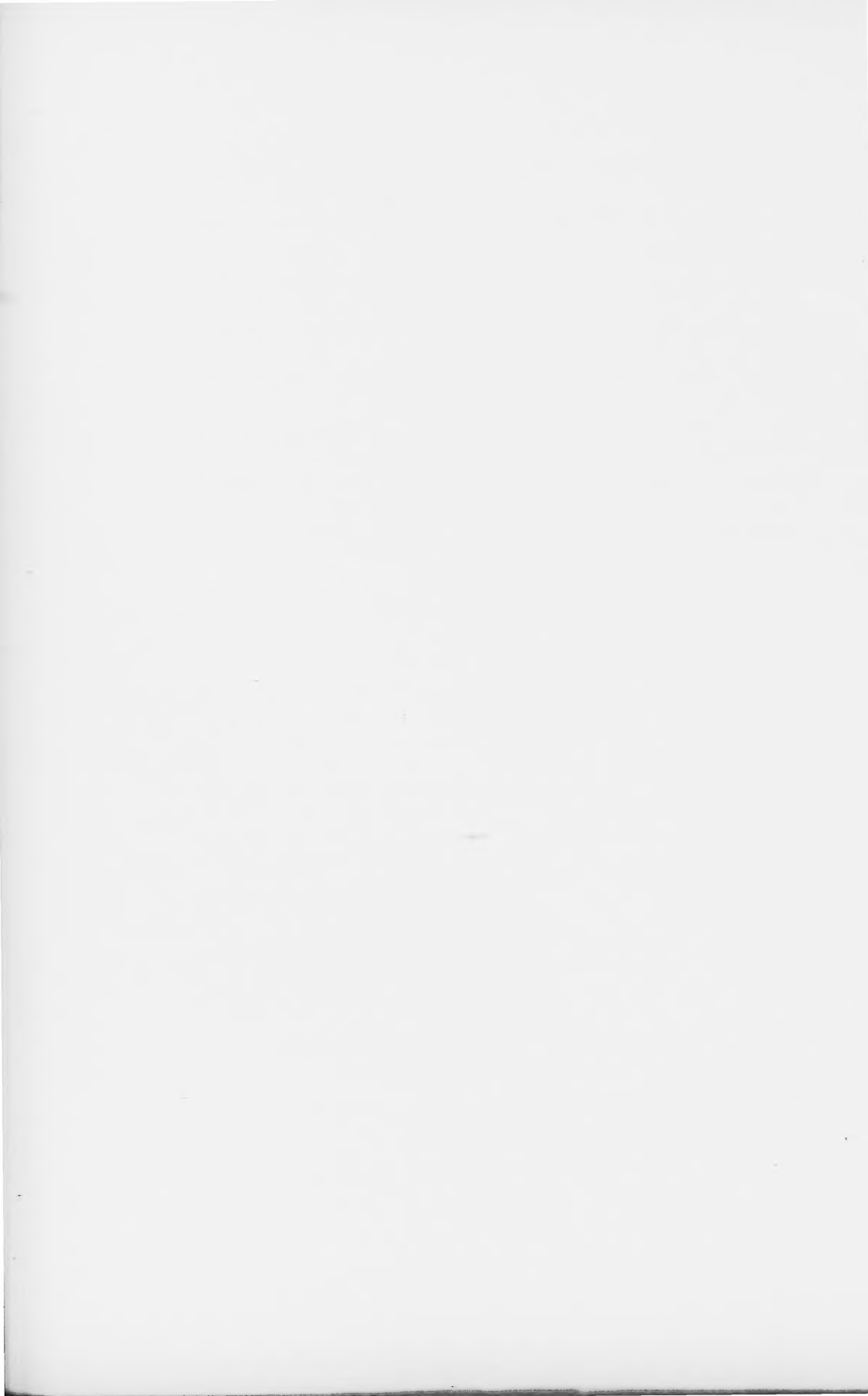
C. The Decision Below Has Decided An Important Question of Law Which Has Not Been, But Should Be, Settled By This Court

Most, if not all, of the charges presented by Respondent Carey at the MSAC meeting in 1981 were utilized by Respondent Carey in prior disciplinary proceedings instituted by him against Petitioner. February 26, 1982 Opinion And Order of the district court, page 34, footnote 24 (Appendix, page 55). Each of these prior proceedings, if successful, would have resulted in the termination of Petitioner's medical staff privileges at The University Hospitals. None of the prior proceedings resulted in any termination or curtailment of such privileges. Therefore, Petitioner argued in both the district court and in the court of appeals that the principle of



administrative res judicata prevented Respondents from utilizing before the MSAC in 1981 as grounds for not continuing Petitioner's medical staff privileges any of the grounds used in any of the prior disciplinary proceedings. The district court rejected this argument, and the court of appeals affirmed that rejection on two grounds.

One of the grounds relied upon by the court of appeals was that "None of the former proceedings reached a point whereby the parties were given a full opportunity to litigate the charges brought against plaintiff." Yashon v. Hunt, 825 F.2d at 1021 (Appendix, page 10). Although this statement is technically correct, it ignores the fact that each of the prior administrative proceedings which form



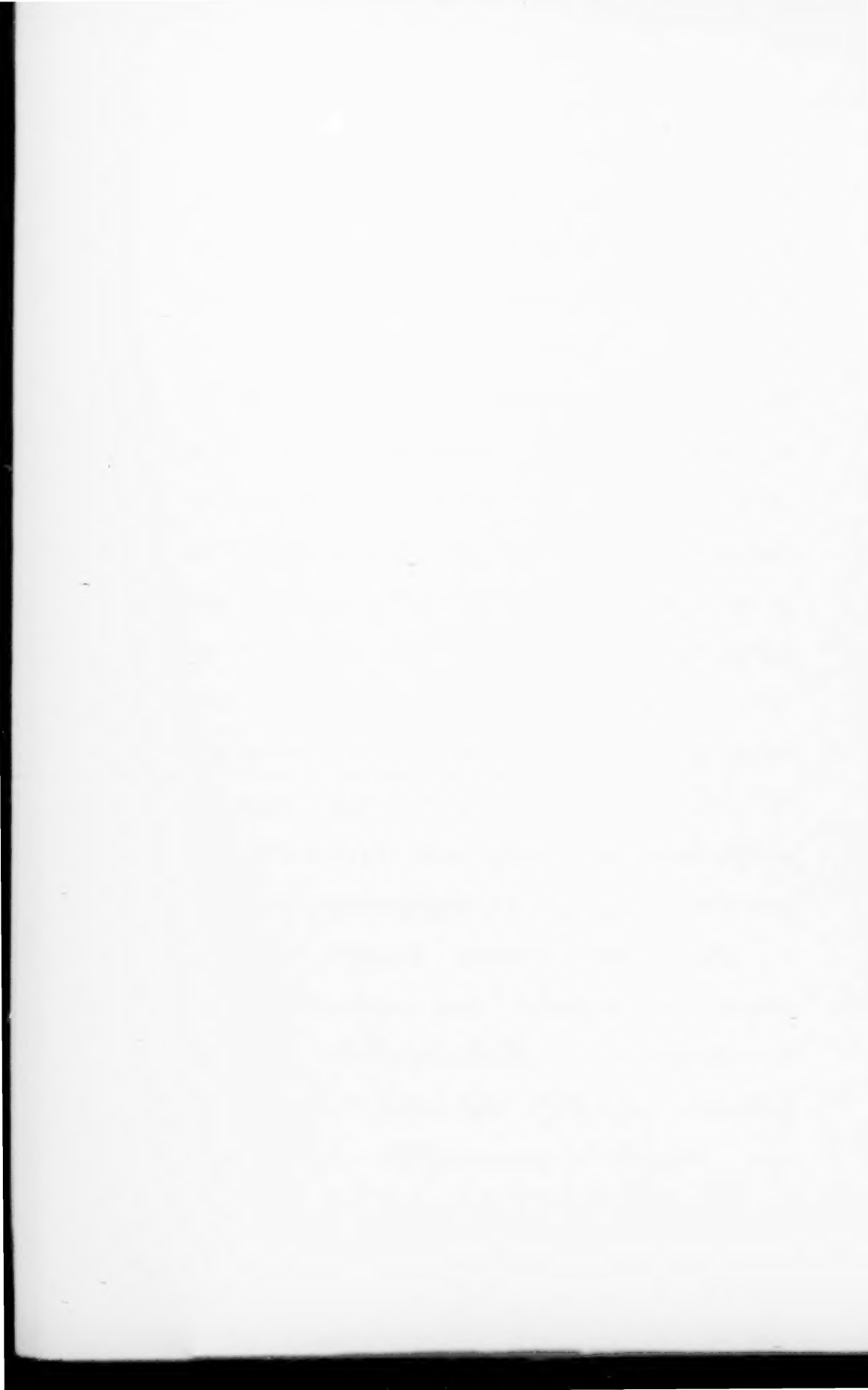
the factual foundation of Petitioner's administrative res judicata argument provided the opportunity at some point in time for a trial-like hearing with witnesses and cross-examination of adverse witnesses. These prior proceedings were conducted either under Articles V and VI of the prior medical staff bylaws of The University Hospitals or Section 3335-5-04 of the Ohio Administrative Code, which contains the rules of The Ohio State University concerning detenurization. Both sets of rules provided for the presentation of live witnesses, cross-examination of adverse witnesses, and full participation of counsel if the proceedings advanced to a certain level. However, in each of the prior administrative proceedings, the final administrative decision was that

Respondent Carey had failed to present sufficient evidence at the preliminary stage of the administrative proceeding to show that Petitioner's medical staff privileges should be curtailed or terminated.

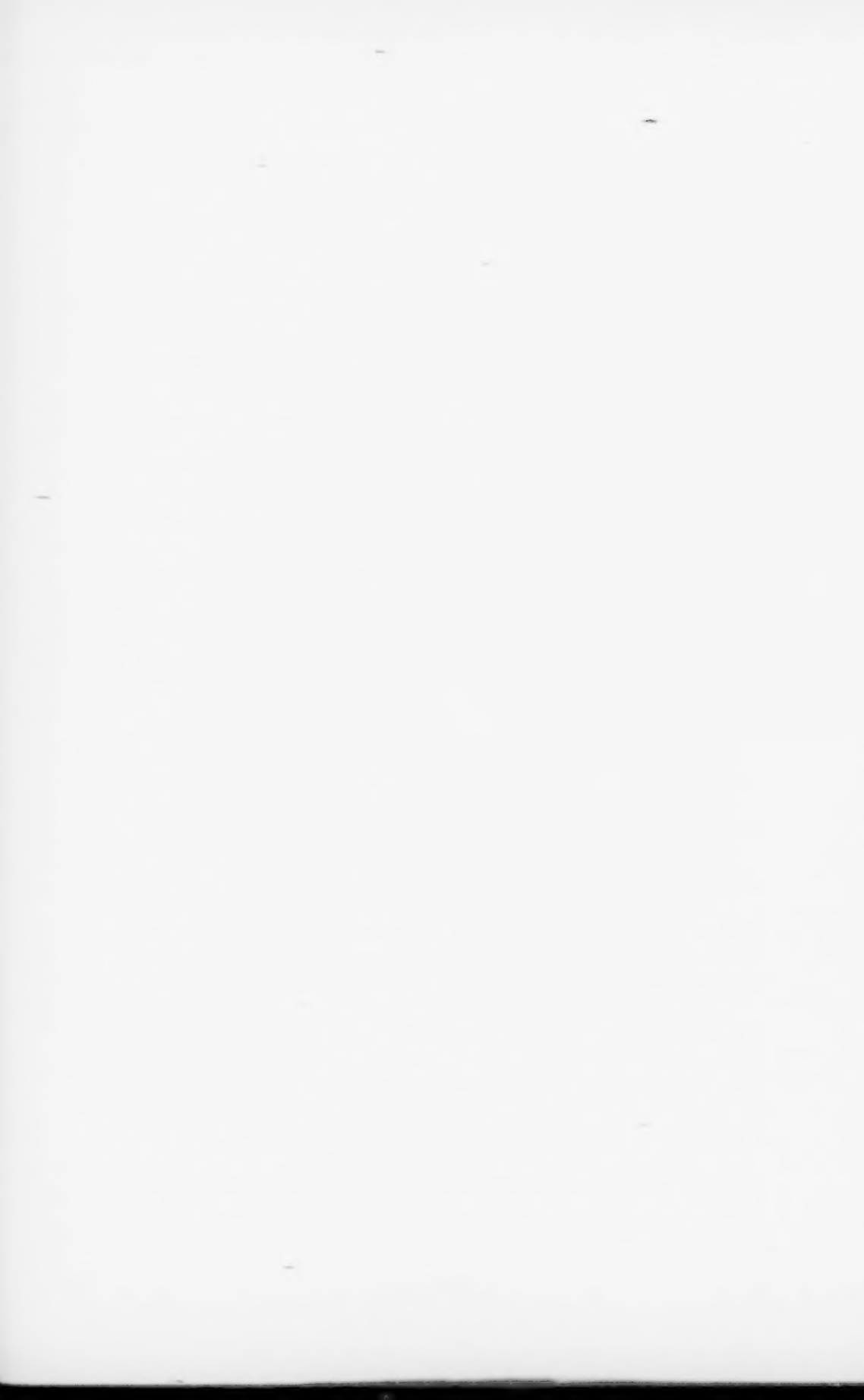
The court of appeals below fashioned a rule of law that administrative res judicata is applicable only if the formal trial-like stage of administrative proceedings is actually reached. This is a rule of law never passed on by this Court, but one which this Court should settle. It is not uncommon for administrative rules to provide that the trial-like stage of an administrative proceeding will be reached only if some preliminary showing is made at an earlier, informal stage of the proceedings. See Gaston

v. Richardson, 451 F.2d 461 (6th Cir. 1971). These informal stages are analogous to motions to dismiss or for summary judgment in judicial proceedings. This Court should settle the issue of whether the termination of an administrative proceeding at some stage before the trial-like stage is reached is sufficient to invoke the principle of administrative res judicata. What little law there is on this issue suggests that the termination of an administrative proceeding at such an earlier stage is sufficient to invoke administrative res judicata. Gaston v. Richardson, supra.

The other reason stated by the court of appeals for rejection of Petitioner's administrative res judicata argument was that "several of the former proceedings did not



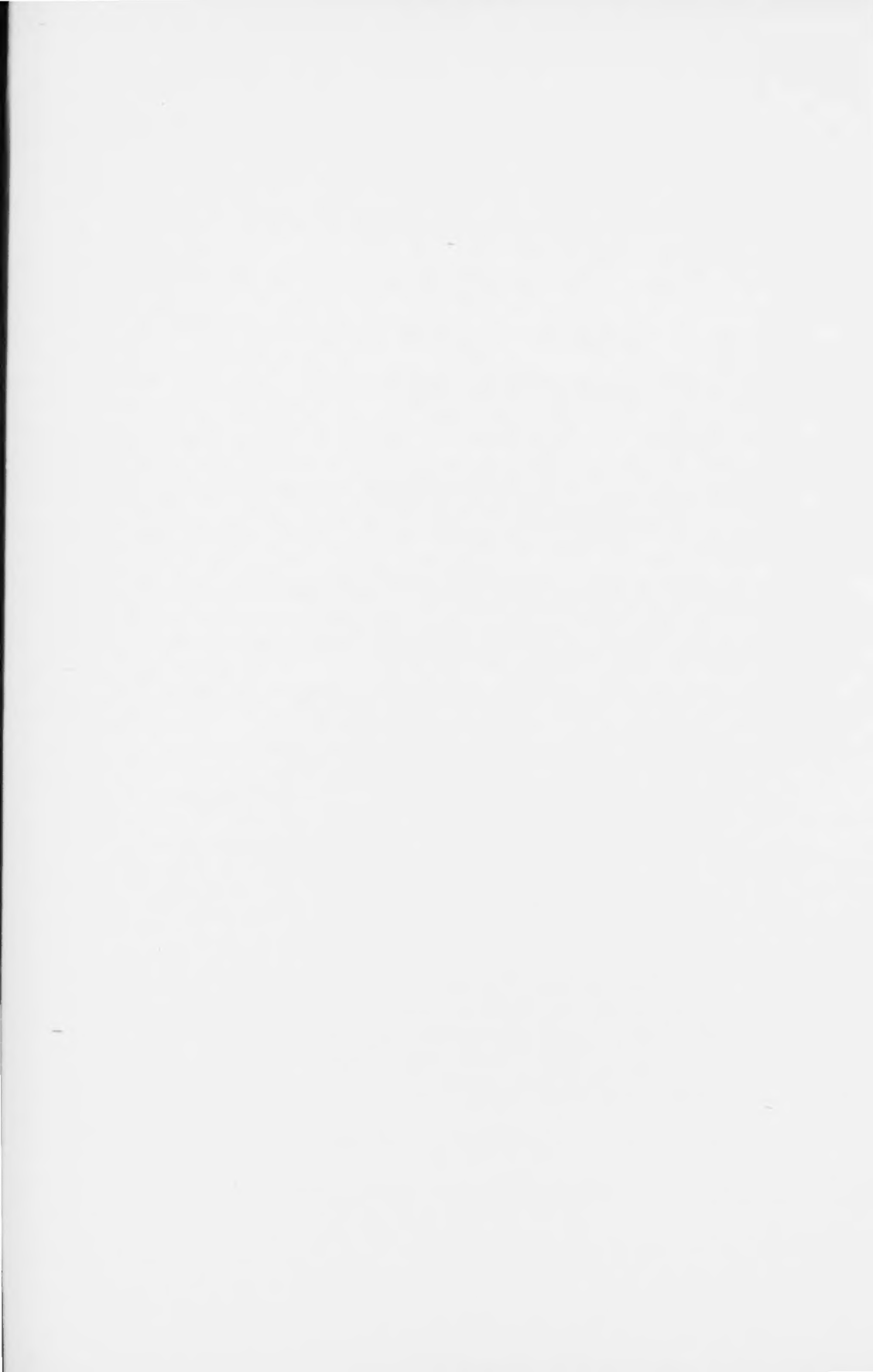
definitively resolve the charges asserted against plaintiff in that he was not completely exonerated of improper conduct." Yashon v. Hunt, 825 F.2d at 1022 (Appendix, page 10). This reason is clearly erroneous and hence it should not prevent this Court from reaching the more important administrative res judicata issue discussed above. To the extent that the prior proceedings sought the termination or curtailment of Petitioner's medical staff privileges, Petitioner was completely exonerated in that insufficient grounds were found in any of these proceedings for such termination or curtailment. The ruling of the court of appeals on this issue is tantamount to a ruling that res judicata does not apply to a plaintiff in a civil suit for money who obtains



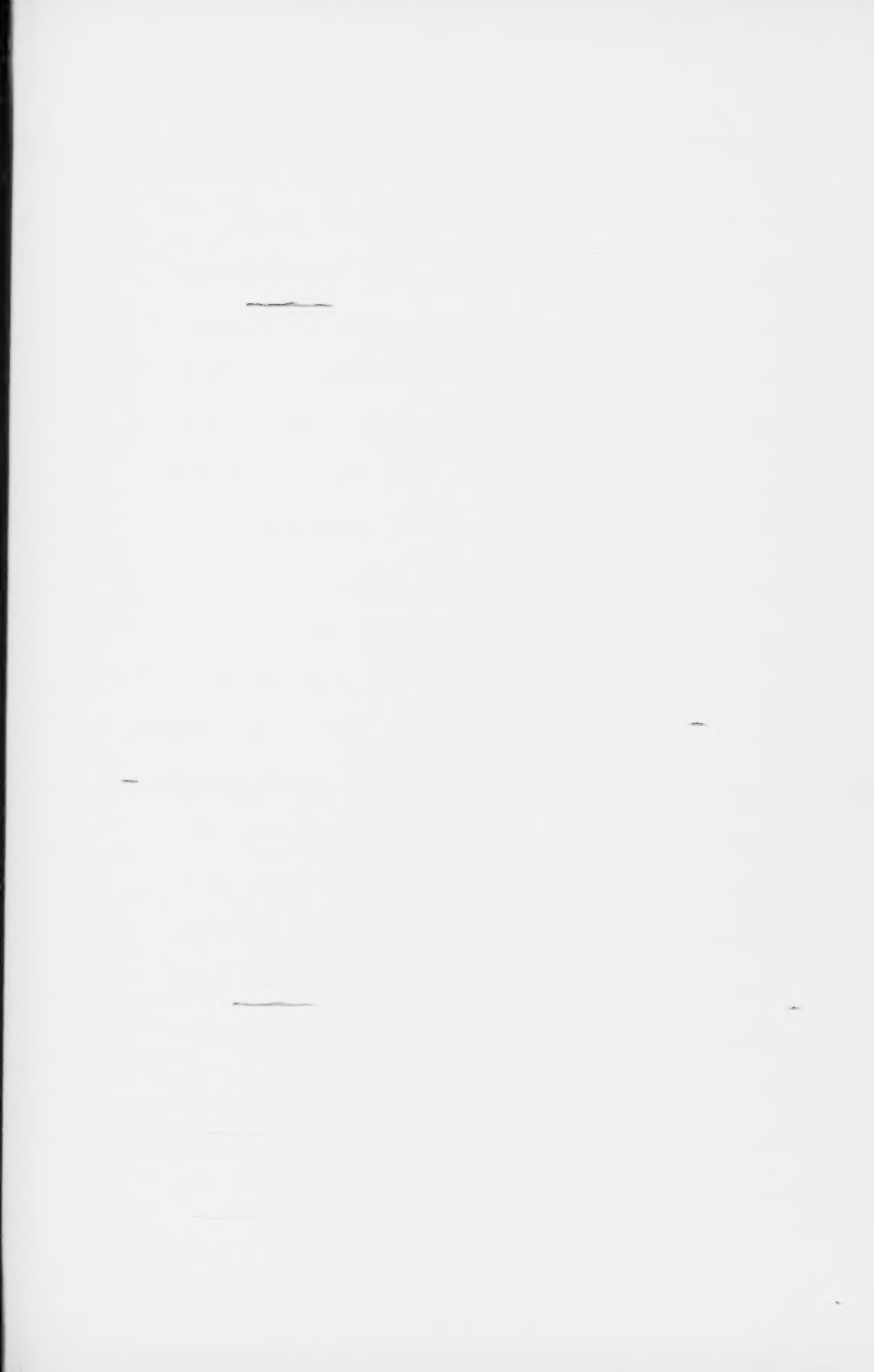
as a result of trial a judgment for some amount against defendant which is less than the full amount plaintiff sought. Clearly in such a case, the plaintiff cannot sue defendant on the same cause of action as asserted in the first action for the amount he did not recover in the first action. Similarly, just because Petitioner was allegedly not "fully exonerated" in the prior proceedings does not allow Respondents to attempt once again to terminate his medical staff privileges based on the same charges utilized in the prior proceedings.

D. The Decision Below So Far Departed From The Accepted And Usual Course of Judicial Proceedings As To Call For An Exercise Of This Court's Power of Supervision

Several gross violations of procedural due process have resulted in



the termination of an extremely important property interest held by Petitioner and admitted by Respondents as protected by the due process clause of the fourteenth amendment to the federal Constitution. The violations of due process consisted in allowing Respondent Carey to call witnesses to testify against Petitioner, while denying to Petitioner the opportunity to present witnesses in his own behalf, and in allowing the MSAC to terminate Petitioner's medical staff privileges without stating either the reasons for such action or the evidence the MSAC relied on. These deprivations of due process are so apparent, and the harm caused by such violations to Petitioner are so great, as to justify this Court's intervention in this case pursuant to this Court's power of



supervision over the lower federal courts.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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